

NOT FINAL UNTIL TIME EXPIRES FOR REHEARING, AND IF FILED, DETERMINED

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT  
OF THE STATE OF FLORIDA, IN AND FOR PASCO COUNTY  
APPELLATE DIVISION

ANDRE LAVON GRANT,  
Appellant,

UCN: 512019AP000092APAXES

Appeal No.: 19-AP-92

v.

L.T. No.: 15-MM-4197

STATE OF FLORIDA,  
Appellee.

\_\_\_\_\_/

On appeal from Pasco County Court,  
Honorable William G. Sestak

Andre Lavon Grant, pro se  
for Appellant.

No response required,  
for Appellee.

**ORDER AND OPINION**

Appellant seeks appellate review of the trial court's order summarily denying without an evidentiary hearing his motion for postconviction relief filed under Florida Rule of Appellate Procedure 3.850. For the foregoing reasons, the trial court's order is affirmed.

**STATEMENT OF THE CASE AND FACTS**

Appellant was charged by Information with Obstructing or Resisting an Officer without Violence during an investigation into whether Appellant had committed battery against his wife.<sup>1</sup> Appellant was found guilty of the charged offense after a jury trial. He was adjudicated guilty and sentenced to one year of probation. The judgment and order of probation were affirmed by this Court on direct appeal. See *Grant v. State*, Case No. 16-CF-3762 (Fla. 6th Cir. Ct. Mar. 10, 2017).

\_\_\_\_\_  
<sup>1</sup> Ultimately, the state attorney's office did not charge Appellant with domestic battery. See case number 15-MM-4196.

Appellant later timely-filed a pro se motion for postconviction relief with the trial court. The motion raised multiple claims of ineffective assistance of trial counsel and a claim of actual innocence. The motion also asked the trial court to appoint postconviction counsel to represent him. The trial court denied the actual innocence claim, struck the ineffective assistance of trial counsel claims as facially insufficient, and appointed postconviction counsel for Appellant.

Postconviction counsel then filed an amended motion.<sup>2</sup> At some point thereafter, postconviction counsel obtained the trial court's permission to file a second amended motion. The trial court's order ruling on the second amended motion addressed claims raised in both Appellant's pro se motions and postconviction counsel's motions. The trial court struck three claims as facially insufficient and reserved ruling on the remaining claims. The trial court's order granted Appellant's postconviction counsel permission to file a third amended motion.

Appellant's third amended motion filed by postconviction counsel raised the following claims of ineffective assistance of trial counsel: failure to investigate and speak with Shecoya Pope and Cierra Hall prior to trial (part of Ground Two), failure to inquire into possible racial biases of potential jurors during voir dire (Ground Five), and failure to convey plea offers (Ground Six).

The third amended motion expressly declined to adopt the following ineffective assistance of trial counsel claims: any claims related to a failure to investigate body-worn camera videos (Ground One), failure to investigate or speak with Kayla Hall and Deputy Matthew Brewer prior to trial (part of Ground Two), failure to object to Appellant's wife's testimony that Appellant was arrested for battery (Ground Three), and misadvising Appellant not to testify during trial (Ground Four). The trial court issued a final order denying the third amended motion. Appellant timely-appeals.

### **STANDARD OF REVIEW**

In an appeal from an order denying a Rule 3.850 motion for postconviction relief alleging ineffective assistance of trial counsel without holding an evidentiary hearing, a

---

<sup>2</sup> Appellant also filed a pro se amended motion. However, that motion was a nullity and should have been stricken because of the appointment of postconviction counsel. See *Sheppard v. State*, 17 So. 3d 275, 282 (Fla. 2009) (holding that a trial court cannot entertain a pro se pleading if the defendant is represented by an attorney unless the pro se pleading makes allegations against that attorney that would give rise to a clear adversarial relationship).

defendant's factual assertions must be accepted as true to the extent they are not rebutted by the record. The trial court's legal conclusions are reviewed de novo. *Thompson v. State*, 759 So. 2d 650, 663 (Fla. 2000).

### **LAW AND ANALYSIS**

Appellant's initial brief raises six claims, one claim in the Summary of the Argument section and five claims under Grounds II through VI.<sup>3</sup> None warrant relief.

#### **1. Ineffective Assistance of Postconviction Counsel**

In the Summary of the Argument section of his initial brief, Appellant claims that his appointed postconviction counsel was ineffective while representing Appellant in the Rule 3.850 proceedings before the trial court. However, a claim of ineffective assistance of postconviction counsel is not cognizable before either a trial court or an appellate court. See *Peterka v. State*, 890 So. 2d 219, 241 (Fla. 2004).

#### **2. Ineffective Assistance of Trial Counsel – Failure to Investigate Witnesses**

In Ground II of his initial brief, Appellant argues that the trial court erred by summarily denying his claim that trial counsel was ineffective by failing to investigate and speak with Shecoya Pope and Cierra Hall prior to trial. Ms. Pope was a witness for Appellee during trial. Ms. Hall was not called as a witness by either party.

Appellant's motion before the trial court argued that had trial counsel spoken with Ms. Pope, she would have informed trial counsel that she may have exaggerated her testimony but that she would not change her testimony for fear of being charged with perjury.

The motion argued that had trial counsel spoken with Ms. Hall prior to trial, she would have informed trial counsel and would later have testified at trial that Appellant's wife knocked on Appellant's door and wanted to be let in. She also would have testified that she did not see or hear anything that would have caused her to think that his wife was in any danger. Appellant argued that this would have refuted Ms. Pope's testimony that Appellant dragged his wife into his room against her will. Appellant attached to the second and third amended motions an affidavit sworn and signed by Ms. Hall.

---

<sup>3</sup> Appellant's initial brief purports to raise a claim under Ground I. However, Ground I does not allege a specific error. Instead, it recites the legal standard that a trial court must follow before summarily denying a claim of ineffective assistance of trial counsel and argues that the trial court failed to follow that standard when it summarily denied the ineffective assistance of trial counsel claims listed in Grounds II through V of the initial brief.

Even if trial counsel was deficient, we hold that Appellant was not prejudiced by the deficiency because the portion of the record attached to the trial court's order shows that there is no reasonable probability that the outcome of the trial would have been different.

Ms Hall's affidavit conflicts with Ms. Pope's trial testimony regarding Appellant's actions towards his wife. However, Appellant was not charged with battering his wife. He was charged with obstructing or resisting law enforcement without violence. The focus of that charge is whether the defendant was obstructing a law enforcement officer who was engaged in the lawful execution of a legal duty. In determining whether law enforcement was engaged in the lawful execution of a legal duty, the question is what information did law enforcement have at the time the defendant was alleged to have obstructed them? Information learned after the fact is irrelevant if that information was not known by law enforcement at the time of execution of their legal duty and the defendant's obstruction.

The portions of the record attached to the trial court's order show that at the time the deputies were investigating, the only information they had was that Ms. Pope told them that she observed Appellant pick up his wife and drag her into his bedroom and then heard her say "get off me" and "you're hurting my back. I can't breathe." Ms. Pope told the deputies that Appellant would not let her in the room to check on his wife. Ms. Hall, despite being present, did not tell law enforcement that the wife knocked on the bedroom door and asked Appellant to be let in. At the time of the investigation and Appellant's obstruction, Ms. Hall did not contradict what Ms. Pope told law enforcement in any way. And after the deputies arrived at Appellant's residence, they could see that the wife was laying unmoving on the bed. This was the information available to the deputies when they ordered Appellant to open the bedroom door and let them in, which Appellant refused to do, thus obstructing law enforcement without violence.

Had Ms. Pope and Ms. Hall testified at trial as alleged in Appellant's postconviction motion, their testimony would have had no effect on the outcome of the trial. Their testimony would not have changed the fact that they did not make these statements to the deputies and therefore at the time the deputies ordered Appellant to open the bedroom door, there was no information available to the deputies that contradicted Ms.

Pope's statements to them that that Appellant had dragged the wife into his bedroom against her will and then hurt her. Therefore, at the time Appellant refused to let the deputies into the room, law enforcement had no reason to know or believe that the wife was not in danger or that Ms. Pope was not telling the truth. Because the outcome of the trial would not have been different, the trial court did not err by summarily denying this claim without an evidentiary hearing.

### **3. Ineffective Assistance of Trial Counsel – The Wife's Testimony**

In Ground III of his initial brief, Appellant argues that the trial court erred by summarily denying his claim that trial counsel was ineffective by failing to object to his wife's testimony that Appellant had been arrested for battery. Additionally, Appellant argues that trial counsel should have moved for a *Richardson*<sup>4</sup> hearing when she was called as a witness because she was not on Appellee's witness list.

This claim was initially stricken by the trial court as facially insufficient. Because postconviction counsel expressly refused to adopt and correct the claim, the facial insufficiency was not cured and the trial court did not err by summarily denying the claim without an evidentiary hearing. See Fla. R. Crim. P. 3.850(f)(3); *Spera v. State*, 971 So. 2d 754, 761 (Fla. 2007).

Even if the claim were facially sufficient, the fact that postconviction counsel expressly refused to adopt it in the third amended motion would have resulted in the claim's denial. See *Chacon v. State*, 938 So. 2d 532, 533 (Fla. 2d DCA 2006) (affirming the denial of a pro se newly discovered evidence claim where the trial court denied the claim because appointed counsel abandoned the claim after being appointed).

### **4. Ineffective Assistance of Trial Counsel – Misadvice not to Testify**

In Ground IV of his initial brief, Appellant argues that the trial court erred by denying his claim that trial counsel was ineffective by misadvising Appellant not to testify in his own defense. As with Ground III, the trial court initially struck this claim as facially insufficient. Because postconviction counsel expressly refused to adopt and correct the claim, the facial insufficiency was not cured and the trial court did not err by summarily denying the claim without an evidentiary hearing. See Fla. R. Crim. P. 3.850(f)(3); *Spera*, 971 So. 2d at 761.

---

<sup>4</sup> *Richardson v. State*, 246 So. 2d 771 (Fla. 1971).

As with Ground III, even if the claim were facially sufficient, the fact that postconviction counsel expressly refused to adopt it in the third amended motion would have resulted in the claim's denial. See *Chacon*, 938 So. 2d at 533.

#### **5. Ineffective Assistance of Trial Counsel – Possible Jury Bias**

In Ground V of his initial brief, Appellant argues that the trial court erred by denying his claim that trial counsel was ineffective by failing to ask questions during voir dire that would have exposed jury bias. Appellant asserts that because he is an African-American man in an interracial marriage with a white woman, trial counsel should have asked questions during voir dire that addressed possible juror racial prejudices. Appellant claims that had trial counsel done so, any jurors that might have had a bias would have been removed from the jury.

The trial court found this claim facially sufficient but summarily denied it for two reasons. First, the trial court found that the claim was speculative. Second, the trial court found that Appellant had expressly approved of the jury that trial counsel selected. With regard to the first basis for denial, the trial court was correct that this claim was speculative because the claim alleged that there might have been biased jurors. Generally, speculation cannot form the basis of postconviction relief. See *McLean v. State*, 147 So. 3d 504, 512 (Fla. 2014). However, potential juror racial bias is an exception to that general rule. Accordingly, Appellant's claim could not have been summarily denied based on its speculative nature. See *Fennie v. State*, 855 So. 2d 597, 602-603 (Fla. 2003).

That said, the trial court's second basis for denial was correct. See *Kelley v. State*, 109 So. 3d 811, 812-13 (Fla. 1st DCA 2013) (citing *Stano v. State*, 520 So. 2d 278, 279 (Fla. 1988)). In *Kelley*, a defendant claimed that trial counsel was ineffective for failing to strike two jurors for cause. *Id.* at 812. The First District affirmed the trial court's denial of that claim because the defendant had expressly and affirmatively told the trial court that he agreed with the jury trial counsel had selected. *Id.* at 813. Citing *Stano*, the First District wrote that a "rule 3.850 motion cannot be used to go behind representations the defendant made to the trial court, and the court may summarily deny post-conviction claims that are refuted by such representations." *Id.* at 812-13.

In the instant case, Appellant obviously knew that he was in an interracial marriage at the time of voir dire. The portion of the trial court record attached to the trial court's

order shows that Appellant expressly stated that he was satisfied with the jury that trial counsel had selected despite that knowledge. Similar to the defendant in *Kelley*, Appellant cannot now go behind his express representation to the trial court. Accordingly, the trial court did not err by summarily denying this claim without holding an evidentiary hearing.

## **6. Evidence Adduced During Trial**

In Ground VI of his initial brief, Appellant alleges that the evidence adduced at trial should have resulted in him being found not guilty and that therefore his conviction should be vacated. To the extent Appellant is appealing the trial court's denial of his "actual innocence" claim in his initial pro se Rule 3.850 motion, the trial court did not err.<sup>5</sup> Claims of actual innocence are not cognizable in a Rule 3.850 motion. See *Dailey v. State*, 283 So. 3d 782, 787 (Fla. 2019) ("Moreover, we have repeatedly held that freestanding actual innocence claims are not cognizable under Florida law").

To the extent Appellant argues that either the trial court or the jury erred during the trial, such claims must be raised on direct appeal. They cannot be raised for the first time and are not cognizable in a Rule 3.850 motion for postconviction relief. See *Rodriguez v. State*, 919 So. 2d 1252, 1280 (Fla. 2005) (providing that issues that should have been addressed on direct appeal are procedurally barred even under the guise of ineffective assistance of trial counsel).

---

<sup>5</sup> Because Appellant's actual innocence claim was denied by the trial court prior to the appointment of postconviction counsel, the claim was not a nullity and was not deemed abandoned.

### **CONCLUSION**

Because the record conclusively refuted two of Appellant's claims and the remainder of Appellant's claims were either facially insufficient or procedurally barred, the trial court did not err when it summarily denied Appellant's third amended motion for postconviction relief without holding an evidentiary hearing. Accordingly, the trial court's order is affirmed.

It is therefore ORDERED and ADJUDGED that the order of the trial court is hereby AFFIRMED.

DONE AND ORDERED in Chambers at New Port Richey, Pasco County, Florida  
this \_\_\_\_ day of \_\_\_\_\_, 2020.

Original Order entered on December 17, 2020, by Circuit Judges Linda Babb,  
Kimberly Sharpe Byrd, and Lauralee Westine.

*Copies to:*

**Honorable William G. Sestak**

**Andre Lavon Grant, PhD**

628 Hudson Street

Daytona Beach, FL 32114-5114

**Office of the State Attorney**

**Staff Attorney**